Case No. 12-2621

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

GABRIEL JOSEPH CARRERA,
ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

Plaintiff-Appellee,

v.

BAYER CORPORATION AND BAYER HEALTHCARE, LLC,

Defendants-Appellants.

On Appeal from the December 8, 2011 Class Certification Decision of the United States District Court for the District District of New Jersey, Case No. 2:08-cv-4716 (JLL) (MAH), Honorable Jose L. Linares

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BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL OF THE DISTRICT COURT'S RULING

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASE

FEDERAL RULE

STATE STATUTE

OTHER AUTHORITY

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS

The Product Liability Advisory Council ("PLAC") respectfully submits this brief as *amicus curiae* in support of defendants-appellants Bayer Corporation and Bayer Healthcare, LLC ("defendants" or "Bayer").

STATEMENT OF INTEREST

PLAC is a non-profit association with more than 100 corporate members representing a broad cross-section of American and international product manufacturers.[1] These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC.

Since 1983, PLAC has filed more than 900 briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective of

[1] A list of PLAC's current corporate membership is attached to this brief as Appendix A.

product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability.

PLAC's members have an interest in the ruling below because the district court's loose application of Federal Rule of Civil Procedure 23 has the potential to dramatically increase the class action exposure of PLAC's members and all companies doing business in the United States.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves a class of consumers that will be impossible to ascertain: Florida residents who purchased One-A-Day WeightSmart, a multivitamin that Bayer stopped selling in January 2007 – more than five years ago. As the experience of the named plaintiff vividly illustrates, membership in the class cannot be demonstrated through objective documentation. Most consumers do not keep receipts or packaging from small-value, one-use products consumed years ago, and although plaintiff proposed that store loyalty programs might provide a means of establishing such purchases, he could not substantiate his own purchases (or offer any evidence that anyone else's purchases could be substantiated) through such evidence.

Instead, plaintiff proposes to prove class membership – for himself and for the alleged members of the class – through self-serving statements whose veracity Bayer would have no ability to challenge. As the district court's brief order

described it, plaintiff and the other class members who lack objectively verifiable evidence that they ever purchased WeightSmart could "establish" class membership by way of "claim forms or affidavits." (A009.) The order makes no provision for any substantive challenge to these proposed forms or affidavits; rather, the court viewed such submissions as "sufficient" in themselves to "verify claims." (*Id.*)

The court's endorsement of such a procedure violates Bayer's fundamental right to present individualized defenses, a right that is protected by the Due Process Clause of the Fifth Amendment. That right cannot be vitiated merely because this is a putative class action or because the claims at issue have low dollar values. Nor is the right to challenge class membership a mere technicality. Indeed, the record in this case confirms the importance of protecting Bayer's right to challenge claims of class membership. After all, the named plaintiff himself has no definitive evidence that he purchased the product at issue in his suit. To the contrary, there is a real question whether he ever bought WeightSmart, given his erroneous recollection of the product's packaging and the time period when it was on the market. And the experiences of the named plaintiff strongly suggest that other potential class members would face similar challenges in proving that they purchased WeightSmart.

The district court improperly dismissed these concerns as mere "manageability" issues that should "rarely, if ever, be . . . sufficient to prevent certification of a class." (A009.) In so holding, the court confused Bayer's fundamental rights with minor procedural issues that can be disregarded in service of class certification.

If the district court's ruling is allowed to stand, it would not only undermine Bayer's ability to defend itself in this suit, but would also lower the bar to class certification generally, establishing a rule of law that defendants can be held liable to consumers without any real proof that those consumers purchased the defendants' products. Such a result would send the message that administrative convenience can override the basic due-process right to defend oneself in litigation. It would also threaten the viability of companies that sell consumer products within the Third Circuit.

For all of these reasons, and those set forth in Bayer's briefing, the Court should vacate the ruling below.

ARGUMENT

I. THE TRIAL COURT'S METHOD OF ALLOWING "PROOF" OF CLASS MEMBERSHIP VIOLATES BAYER'S RIGHT TO PRESENT INDIVIDUALIZED DEFENSES.

The trial court violated Bayer's due-process rights by allowing alleged class members to "establish" that they purchased WeightSmart – a prerequisite to class

membership and a fundamental element of each class member's substantive claims – through the use of claim forms and affidavits, with no provision for individual challenges by Bayer.

It is well established that the plaintiff bears the burden of proving that the requirements for class certification are satisfied. *See, e.g., Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) ("Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule . . . ."). One such requirement is that the class must be defined in such a way that its members are ascertainable. *Xavier v. Philip Morris USA Inc.*, 787 F. Supp. 2d 1075, 1089 (N.D. Cal. 2011), *23(f) pet. denied*, Order at 1, ECF No. 6, *Xavier v. Philip Morris USA Inc.*, No. 11-80106 (9th Cir. filed June 29, 2011). A class is ascertainable if membership can be established by "reference to objective criteria," *Cunningham Charter Corp. v. Learjet, Inc.*, 258 F.R.D. 320, 325 (S.D. Ill. 2009) – i.e., evidence that could not be subject to serious dispute and would not require complex, individualized inquiries to determine class membership. *See Gibbs Props. Corp. v. Cigna Corp.*, 196 F.R.D. 430, 442 (M.D. Fla. 2000) ("[T]he class must be clearly defined and must be ascertainable without a prolonged and individualized analytical struggle.").

Here, plaintiff defined his proposed class to include all persons who purchased WeightSmart in the State of Florida. Plaintiff's class definition was

limited to actual purchasers for obvious reasons; evidence of product purchase is a fundamental element of the class members' claims under the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"). *See, e.g.*, *Bookworld Trade, Inc. v. Daughters of St. Paul, Inc.*, 532 F. Supp. 2d 1350, 1364 (M.D. Fla. 2008) ("A claim pursuant to FDUTPA has three elements: (1) a deceptive act or unfair practice; (2) causation; and (3) actual damages."); s*ee also* Fla. Stat. § 501.211 (allowing "a person who has suffered a loss as a result of a violation of" the FDUTPA to "recover actual damages").

Although the class definition may seem reasonable on its face, the problem is that plaintiff failed to make any showing that class membership could be ascertained by objectively verifiable evidence. To the contrary, the evidence suggested exactly the opposite. As detailed in Bayer's brief (at 5-8), the named plaintiff himself had no evidence of product purchase – no receipts or evidence from loyalty programs allegedly maintained by sellers of WeightSmart. Instead, he only offered hazy and demonstrably inaccurate recollections of purchasing WeightSmart several years ago.

The district court nonetheless concluded that class membership could be determined through affidavits or claim forms that are similarly based on alleged class members' subjective recollections. In other words, the district court's proposal would permit individuals to prove their membership in the class *and* an

essential element of their claims based entirely on their own say-so, with no opportunity for Bayer to contest or examine these statements. This arrangement violates Bayer's due-process rights.

It has long been recognized that the "fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). This due-process right, in turn, requires that, before a defendant is deprived of his property, a plaintiff must prove every element of his claim and a defendant must be given "'an opportunity to present every available defense.'" *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (quoting *Am. Sur. Co. v. Baldwin*, 287 U.S. 156, 168 (1932)); *see, e.g.*, *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971) (the "right to litigate the issues raised" in a case is "a right guaranteed . . . by the Due Process Clause"); *see also W. Elec. Co. v. Stern*, 544 F.2d 1196, 1199 (3rd Cir. 1976) (recognizing that "to deny [the defendant] the right to present a full defense on the issues would violate due process").

Any proceeding that deems self-serving evidence to "establish" contested points of fact violates this due-process right. Indeed, "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) (citing *ICC v. Louisville & N. R. Co.*, 227 U.S. 88, 93-94 (1913)). Moreover, when "absent procedures would have provided protection

against arbitrary and inaccurate adjudication," there has been no "hesitat[ion] to find the proceedings violative of due process." *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 430 (1994) (citing cases).

These substantive rights apply equally in the class action setting. After all, the class action is merely a procedural device, which, consistent with the Rules Enabling Act, cannot "'abridge, enlarge or modify any substantive right.'" *Dukes*, 131 S. Ct. at 2561 (quoting 28 U.S.C. § 2072(b)). In other words, a class action "leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (2010) (plurality opinion). Accordingly, "a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its . . . defenses to individual claims." *Dukes*, 131 S. Ct. at 2561.

Consistent with these principles, courts have repeatedly recognized that a defendant's due-process rights are violated when individual class members are relieved of proving each element of their claim or where a defendant is prevented from raising a full defense to those claims. For instance, in *McLaughlin v. American Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008), the U.S. Court of Appeals for the Second Circuit invalidated a plan to prove collective damages on a classwide basis. The court found that the plan, which would have involved "an initial estimate of the percentage of class members who were defrauded (and who

therefore ha[d] valid claims)," was likely to result in a damages figure that, among other things, did "not accurately reflect the number of plaintiffs actually injured by defendants." *Id.* at 231. The court further found that "[r]oughly estimating the gross damages to the class as a whole and only subsequently allowing for the processing of individual claims would inevitably alter defendants' substantive right to pay damages reflective of their actual liability." *Id.* The court then concluded that such a scheme "raise[d] serious due process concerns," explaining that when "the right of defendants to challenge the allegations of individual plaintiffs is lost," a "due process violation" results. *Id.* at 232.[2] Other courts have reached similar conclusions. *See, e.g., In re Fibreboard Corp.*, 893 F.2d 706, 711 (5th Cir. 1990) (relying on due-process principles in rejecting a class action trial plan that would have eliminated "the requirement that a plaintiff prove both causation and damage[s]"); *Philip Morris USA Inc. v. Scott*, 131 S. Ct. 1, 3 (2010) (Scalia, J., Circuit Justice) (suggesting that a due-process violation arises when "individual

[2] In reaching this conclusion, the Second Circuit relied on this Court's decision in *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154 (3d Cir. 2001). *See McLaughlin*, 522 F.3d at 232. In *Newton*, the Court affirmed a district court's denial of class certification in a securities class action where "establishing proof of the plaintiffs' injuries and litigating the defenses available to the defendants would present insurmountable manageability problems for the District Court." 259 F.3d at 192. In its ruling, the Court emphasized that "actual injury cannot be presumed, and defendants have the right to raise individual defenses against each class member." *Id.*

plaintiffs who could not recover had they sued separately *can* recover only because their claims were aggregated with others' through the procedural device of the class action"); *Rollins, Inc. v. Butland*, 951 So. 2d 860, 874 (Fla. Dist. Ct. App. 2006) (reversing trial court's grant of class certification where class treatment would deny the defendants the right "to defend against individual claims where there may be no liability"); *cf. Garber v. Randell*, 477 F.2d 711, 716 (2d Cir. 1973) (holding that an overbroad consolidation order may "deny a party his due process right to prosecute his own separate and distinct claims or defenses without having them so merged into the claims or defenses of others that irreparable injury will result").

Citing identical concerns, courts have repeatedly rejected class definitions as unascertainable where proof of membership would depend largely or entirely on self-serving statements in the form of affidavits or claim forms. As these courts have explained, such a method of identifying class members unfairly strips defendants of the right to contest individualized facts that are essential to the class members' claims.

In *Perez v. Metabolife International, Inc.*, 218 F.R.D. 262 (S.D. Fla. 2003), for example, the court refused to certify a proposed class of purchasers of an over-the-counter dietary supplement who alleged product-liability claims because of, *inter alia*, the "serious problems with determining who is entitled to class

membership." *Id*. at 269. In so ruling, the court noted that "unlike in many mass torts or toxic exposure cases, where passenger lists, employment records, or public records can be used to confirm class membership, it is unlikely that many of these putative class members will be able to produce objectively verifiable proof that they ingested the relevant amounts of [the over-the-counter dietary supplement] for the relevant period of time." *Id*. As a result, the court found that the "only evidence likely to be offered in many instances will be the putative class member[']s uncorroborated claim that he or she used the product . . . through affidavits and fact sheets." *Id*. The court found such a result unacceptable because "allowing such uncorroborated and self-serving evidence without giving Defendant an opportunity to challenge the class member's evidentiary submissions would likely implicate Defendant's due process rights." *Id*. The court noted that this was "especially true given that the [medication] [was] only one of several products containing ephedra, at least two others of which have very similar names." *Id.* Accordingly, "any written submissions that do not give the Defendant an opportunity to challenge the memory or credibility of the individual making that averment would provide inadequate procedural protection to the Defendant." *Id*.

A similar conclusion was reached in *Xavier*, 787 F. Supp. 2d at 1090. In *Xavier*, the plaintiffs' proposed class definition would have included California cigarette purchasers who, *inter alia*, smoked Marlboro cigarettes for at least 20

"pack-years" – i.e., "'one pack of Marlboro cigarettes per day for twenty years or the equivalent (*e.g.* two packs a day for ten years).'" *Id.* at 1089 (citation omitted). In denying class certification, the court found that "[t]here [was] no good way to identify . . . individuals" who had smoked 20 pack-years of Marlboros. *Id.* This was so because "[u]nlike in many cases, there are no defendant records on point to identify class members." *Id.*[3] Nor was the court convinced that the plaintiffs' class could be ascertained by "inviting potential class members to submit affidavits attesting to their belief that they [satisfied the class definition]." *Id.* at 1090. Instead, the court rejected such a procedure as being violative of the defendant's rights. As the court explained:

> At trial, Philip Morris will be able to cross-examine [the named plaintiffs] regarding their smoking histories. If absent class members are permitted to testify to their smoking histories by way of affidavit, on the other hand, Phillip Morris would be forced to accept their estimates without the benefit of cross-examination. *Such a procedure would not be proper or just.*

Id. at 1090 (emphasis added). The court also expressed significant concern regarding the reliability of any affidavits, explaining that "it would be easy" for class members "to fade in or out of the class depending on the outcome" on the

[3] This was so despite plaintiffs' contention that the defendant had "data respecting its customer base," which it tracked through a "customer loyalty program." 787 F. Supp. 2d at 1089. According to the court, the database was "incomplete for purposes of" determining class membership because "not all Marlboro smokers may be presumed to have participated" in the program. *Id.*

merits. *Id.* at 1089-90; *see also In re Phenylpropanolamine ("PPA") Prods. Liab. Litig.*, 214 F.R.D. 614, 616 (W.D. Wash. 2003) (rejecting process to ascertain class members through, among other things, the submission of a "certified oath or verification attesting to purchase and possession [of the over-the-counter medicine] as of [a particular date]," where six of eight named plaintiffs did "not possess any physical proof that they purchased and possessed a PPA-containing product" during the class period).[4]

This case presents the very violation of due-process rights that was studiously avoided in *Perez*, *Xavier* and *PPA* by proper denial of class treatment. Like those cases, this is not a situation in which "passenger lists, employment records, or public records can be used to confirm class membership." *Perez*, 218 F.R.D. at 269. As a result, it is almost certain that class members will be unable "to produce objectively verifiable proof that they" purchased WeightSmart. *Id.* Instead, they will have to rely on their memories of small-dollar purchases made, at a minimum, more than five years ago. These memories are likely to be imperfect at best, particularly since the record demonstrates, as in *Perez* and *PPA*, that there

[4] *See also generally* 2 Joseph M. McLaughlin, McLaughlin on Class Actions § 8:6 (8th ed., Nov. 2011 update) ("Courts have rejected proposals to employ class member affidavits and sworn questionnaires as substitutes for traditional individualized proofs" because the written submissions "are, most importantly, not subject to cross-examination.").

were other similar products on the market that potential class members could confuse with WeightSmart. (A008 (plaintiff "could not remember the names of other vitamins he bought, confused the packaging with other One-A-Day vitamin products, and testified that he bought WeightSmart after it was already off the market.") (citing Def.'s Br. at 11-15).) *See also Perez*, 218 F.R.D. at 269 (noting that relying on memory was "especially" problematic given the presence of "two other[]" products with similar names); *PPA*, 214 F.R.D. at 618-19 (noting the presence of products with similar packaging and the demonstrated confusion of class representatives over which products they had actually purchased). And the malleability of distant memories presents the additional risk that alleged class members could "fade in or out of the class depending on the outcome." *Xavier*, 787 F. Supp. 2d at 1089-90. In short, forcing Bayer "to accept [affidavits] without the benefit of cross-examination" would "not be proper or just," *id.* at 1090, and would thus severely undermine its right to due process.

The trial court brushed these concerns aside as mere "manageability" issues, concluding that "a majority of class membership" could be established through records from "loyalty card programs and online purchasing." (A009.) But there is *no* evidence in the record that *any* class member's claim could be verified by reference to such records, and as in *PPA*, it is clear that the named plaintiff's own claim could not. (Bayer Br. at 6-8.) Moreover, even if such records could verify

membership for some portion of the class, they clearly could not verify membership for the majority of claims, let alone all class members, and plaintiff has never contended otherwise. (*Cf.* A023-24 (asserting only that "many" claims could be verified in this manner).)

For all of these reasons, the Court should vacate the district court's order and clarify that due-process rights cannot be sacrificed merely because a plaintiff wishes to aggregate substantial numbers of claims in a class or mass action.[5]

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[5] The certified class also fails Rule 23's typicality and adequacy requirements for similar reasons. *See* Fed. R. Civ. P. 23(a). As courts have recognized, class certification is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998) (citation omitted). Thus, "basic due process" requires that class certification be allowed only where the named plaintiff can establish that his or her claims are so factually and legally similar to the claims of the remaining class members" that he or she can fairly stand in the place of all. *Id*. at 338. Here, plaintiff's inability to demonstrate that he purchased the product over which he is suing renders him an atypical/inadequate representative, both because he may lack standing to sue and because he may not be a member of the very class he seeks to represent, *see Coyle v. Hornell Brewing Co.*, No. 08-2797, 2011 U.S. Dist. LEXIS 97762, 6-7 (D.N.J. Aug. 30, 2011) (rejecting proposed class where the "representative will be unable to prove she made a qualifying purchase" which "would not be fair to class members who may individually have meritorious claims") (citation omitted); *Gilmore v. Sw. Bell Mobile Sys., L.L.C.*, No. 01 C 2900, 2002 U.S. Dist. LEXIS 6308, at *12-13 (N.D. Ill. Apr. 5, 2002) (uncertainty as to whether representative had standing rendered him atypical and inadequate), and because any class trial would inevitably divert into a side-show about whether Mr. Carrera even purchased the product over which he is suing, *see Hively v. Northlake Foods, Inc.*, 191 F.R.D. 661, 668 (M.D. Fla. 2000) (there is a "foreseeable danger" that unique defenses applicable only to the named plaintiff will confuse the issues and "preoccupy [the named plaintiff] to the detriment of purported class members").

II. THE TRIAL COURT'S DENIAL OF DEFENDANTS' DUE-PROCESS RIGHTS AND LAX APPLICATION OF THE ASCERTAINABILITY REQUIREMENT CREATES GRAVE RISKS FOR AMERICAN BUSINESS.

If the trial court's decision is allowed to stand, it will send a resounding and unprecedented message to corporate America: defendants are no longer guaranteed due-process rights in class-action litigation.

The district court's decision establishes that administrative convenience in the class-action context may now trump such fundamental rights as the right to cross-examine an adverse party and the right to raise individual defenses. This message will not be lost on plaintiffs – and their counsel – who will likely rush to file class actions in the district courts of the Third Circuit in order to seize upon this new procedural advantage. The inevitable expansion in class litigation will have widespread negative repercussions on American businesses and industries – and the civil justice system.

There can be no doubt that allowing class membership to be ascertained at the expense of a defendant's basic adversarial rights poses enormous risks to American businesses and industries. If affirmed, the district court's decision would lower the bar to class certification by eliminating the rights of defendants to litigate individualized issues pertaining to class membership, greatly increasing the exposure of manufacturers and other companies to liability for consumer-fraud

claims in cases in which class members are not even required to prove that they purchased the product over which they are suing.

Such a development would be bad for businesses and ultimately, consumers. Loose class certification requirements – including lax application of ascertainability principles – raise the stakes of litigation and the risk of gargantuan verdicts, not to mention bankruptcy. *See* Mark Moller, *The Anti-Constitutional Culture of Class Action Law*, Regulation 50, 53 (Summer 2007). This is so regardless of the merits of the case; "[f]ollowing certification, class actions often head straight down the settlement path because of the very high cost for everybody concerned, courts, defendants, plaintiffs of litigating a class action . . . ." Bruce Hoffman, Remarks, *Panel 7: Class Actions as an Alternative to Regulation: The Unique Challenges Presented by Multiple Enforcers and Follow-On Lawsuits*, 18 Geo. J. Legal Ethics 1311, 1329 (2005) (panel discussion statement of Bruce Hoffman, then Deputy Director of the Federal Trade Commission's Bureau of Competition). This Court recognized as much in *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3rd Cir. 2008):

> Careful application of Rule 23 accords with the pivotal status of class certification in large-scale litigation, because denying or granting class certification is often the defining moment in class actions (for it may sound the 'death knell' of the litigation on the part of plaintiffs, or create unwarranted pressure to settle nonmeritorious claims on the part of defendants) . . . . In some cases, class certification may force a defendant to settle rather than incur the costs of defending a class action and run the risk of

> potentially ruinous liability. Accordingly, the potential for unwarranted settlement pressure is a factor we weigh in our certification calculus.

Id. at 310 (citations and internal quotation marks omitted); *see also In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 26 (1st Cir. 2008) (recognizing that the granting of class certification may "raise[] the stakes of litigation so substantially that the defendant likely will feel irresistible pressure to settle") (citation and internal quotation marks omitted); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (stating that defendants in a class action lawsuit "may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle."). Nobody benefits from so-called "blackmail settlements" that force companies to settle meritless class actions and threaten the viability of manufacturers and sellers.

Certification of classes whose membership cannot be determined through objective, verifiable evidence substantially increases these risks to American business by creating the potential for liability to individuals who never even purchased the defendant's products. It also raises significant concerns regarding the *res judicata* effects of any judgments rendered in cases where class certification is improvidently granted. After all, the requirement that a class be "objectively ascertainable . . . is important because without [an ascertainable class], it will be unclear who is bound by the judgment[.]" *Rodriguez v. Gates*, No. 99-

13190, 2002 U.S. Dist. LEXIS 10654, at *32 (C.D. Cal. May 30, 2002) (citing Manual for Complex Litigation Third, § 30.14, p. 217 (1995)); *see, e.g.*, *Xavier*, 787 F. Supp. 2d at 1089-90 (denying class certification where the plaintiffs, among other things, "utterly fail[ed] to provide a satisfactory answer to the problem of how membership in the proposed plaintiff class could be reliably ascertained for purposes of res judicata in future actions if plaintiffs were to lose this action on behalf of a class"). Such uncertainty can also affect settlement efforts, as defendants will have no assurance regarding who might be bound by such a settlement. *See, e.g.*, *In re Paxil Litig.*, 212 F.R.D. 539, 545-46 (C.D. Cal. 2003) ("[c]ertifying the Plaintiffs in the manner proposed by their counsel might also hamper settlement efforts," because, among other things, it would not be clear who is bound by the judgment).

For all of these reasons, the Court should vacate the certification order and hold that: (1) a class cannot be certified unless membership can be determined by the use of objective, verifiable evidence; and (2) any class proceeding that prevents the defendant from asserting individualized defenses violates due process.

CONCLUSION

For the foregoing reasons, and those stated by defendants-appellants, the Court should vacate the district court's certification order.

Dated: July 30, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,618 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point Times New Roman.

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APPENDIX A

CORPORATE MEMBERS OF THE
PRODUCT LIABILITY ADVISORY COUNCIL

3M
A.O. Smith Corporation
ACCO Brands Corporation
Altec Industries
Altria Client Services Inc.
Anheuser-Busch Companies
Arai Helmet, Ltd.
Astec Industries
Bayer Corporation
Beretta U.S.A Corp.
BIC Corporation
Biro Manufacturing Company, Inc.
BMW of North America, LLC
Boeing Company
Bombardier Recreational Products
BP America Inc.
Bridgestone Americas Holding, Inc.
Brown-Forman Corporation
Caterpillar Inc.
Chrysler LLC
Continental Tire the Americas LLC
Cooper Tire and Rubber Company
Crown Equipment Corporation
Daimler Trucks North America LLC
The Dow Chemical Company
E.I. duPont de Nemours and Company
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, Inc.
Environmental Solutions Group
Estee Lauder Companies
Exxon Mobil Corporation
Ford Motor Company
General Electric Company
General Motors Corporation

GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Harley-Davidson Motor Company
Hawker Beechcraft Corporation
Honda North America, Inc.
Hyundai Motor America
Illinois Tool Works, Inc.
International Truck and Engine Corporation
Isuzu Motors America, Inc.
Jaguar Land Rover North America, LLC
Jarden Corporation
Johnson & Johnson
Johnson Controls, Inc.
Joy Global Inc., Joy Mining Machinery
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Kolcraft Enterprises, Inc.
Kraft Foods North America, Inc.
Leviton Manufacturing Co., Inc.
Lincoln Electric Company
Magna International Inc.
Marucci Sports, L.L.C.
Mazak Corporation
Mazda (North America), Inc.
Medtronic, Inc.
Merck & Co., Inc.
Microsoft Corporation
Mitsubishi Motors North America, Inc.
Mueller Water Products
Nintendo of America, Inc.
Niro Inc.
Nissan North America, Inc.
Novartis Pharmaceuticals Corporation
PACCAR Inc.
Panasonic
Pella Corporation
Pfizer Inc.
Porsche Cars North America, Inc.
Purdue Pharma L.P.

Remington Arms Company, Inc.
RJ Reynolds Tobacco Company
Schindler Elevator Corporation
SCM Group USA Inc.
Segway Inc.
Shell Oil Company
The Sherwin-Williams Company
Smith & Nephew, Inc.
St. Jude Medical, Inc.
Stanley Black & Decker, Inc.
Subaru of America, Inc.
Synthes (U.S.A.)
Techtronic Industries North America, Inc.
Terex Corporation
TK Holdings Inc.
The Toro Company
Toshiba America Incorporated
Toyota Motor Sales, USA, Inc.
Vermeer Manufacturing Company
The Viking Corporation
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Watts Water Technologies, Inc.
Whirlpool Corporation
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
Zimmer, Inc.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of The Product Liability Advisory Council As *Amicus Curiae* Supporting Defendants-Appellants and Reversal was filed via the Court's electronic filing system on July 30, 2012, which will serve electronic notice to all parties of record.

s/John H. Beisner
John H. Beisner